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No. 90-321

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In the Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK R. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for failing to provide warning of a flash flooding hazard to recreational users of a national forest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A12) is not reported but the decision is noted at 898 F.2d 156 (Table). The order of the district court (Pet. App. A13-A18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990, and a petition for rehearing was denied on May 25, 1990. Pet. App. A19. The petition for a writ of certiorari was filed on August 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Agriculture's Forest Service manages watersheds on National Forest lands to safeguard the water supply and administers recreational resources on those lands. 36 C.F.R. 200.3(b)(2)(ii). Its activities are governed by procedures set forth in the Forest Service Manual (FSM) (1990), issued by the Forest Service's Washington, D.C. office. Pet. App. A3. FSM Section 6703 announces the Forest Service policy to "reduce the number of injuries * * * in situations under Forest Service jurisdiction by * * * [p]roviding safe and healthful facilities and pertinent safety and health information to visitors." Pet. App. A23. With regard to flood warnings, FSM Section 2512.3 provides:

Flood Warning and Preventive Action Planning. Flood probabilities and forecasting have been developed primarily to meet the needs of downstream communities and are of limited use for many National Forest System headwater conditions. Flood stages are not adequately defined for headwater streams. The streams may crest long before crest stage is reached at key forecasting stations.

Line officers are responsible for initiating, planning, and arranging for obtaining quantitative precipitation forecasts and assisting National Forests with timely flood or high water warnings to expedite damage control activities. Each forest should ultimately develop its own flood and high water warning system.

Pet. App. A23. The Forest Service has no articulated policy regarding the identification of natural hazards. *Id.* at A5. Instead, the Service has announced its general policy to promote public safety and has left it to District Rangers to decide exactly how best to protect visitors. *Id.*

at A15. The emphasis has been on man-made hazards, such as trails and campgrounds. *Id.* at A5.

2. In 1976, pursuant to these directives, the Forest Service established a Public Safety Plan for the Coronado National Forest, located in southern Arizona. The plan was drafted by the District Ranger, the "line officer" for the Santa Catalina Ranger District, and included goals for the Tanque Verde Falls area. That area is not a permanent recreational facility; rather, it is a rugged, wild territory near a river flowing down a steep canyon in the Santa Catalina mountains. The area is undeveloped, reachable only by dirt road and a half-mile hike. Pet. App. A4-A5.

The District Ranger identified the major safety hazards in the Tanque Verde area and directed actions to minimize the risks these hazards posed to visitors. Though the initial plan called for signs in the area warning of the primary perils—namely, diving into shallow pools and slipping from steep slopes—the District Ranger eventually rejected the use of these warning signs because the multitude of access trails into the Tanque Verde Falls area made them impracticable. Pet. App. A4. The District Ranger did not identify flash floods as a safety hazard. Though the Ranger knew of the potential for flash floods in any Santa Catalina canyon, prior to the flood herein no one had ever been injured or killed by flash floods in the entire district, and the Tanque Verde Falls area was no more at risk than any of the other canyons in the mountains. *Id.* at A5. Accordingly, on July 26, 1981, there were no warning signs to alert visitors to the danger of flash floods, nor was access to the area restricted. *Ibid.*

3. On July 26, 1981, a flash flood swept through the Tanque Verde Falls area of the Coronado National Forest, killing eight people and injuring several others who were using the area for recreational purposes. Pet. App. A3. Petitioners, relatives of the deceased, filed a wrongful

death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The complaint alleged that the United States had been negligent in failing to warn the public of the danger of flash floods, failing to monitor upstream conditions that the United States knew or should have known would result in flash flooding, and failing to take measures to protect recreational users of the Tanque Verde Falls area. Pet. App. A6.

The government moved to dismiss the complaint for lack of subject matter jurisdiction under the FTCA's discretionary function exception. 28 U.S.C. 2680(a). After a hearing, the district court granted the government's motion and dismissed the complaint, finding that the District Ranger had discretion to decide how to protect public safety and that the decision not to warn of flooding fell within that discretion. Pet. App. A13-A18. The court of appeals affirmed. *Id.* at A2-A12. The court explained that "FSM 2512.3 specifically invests in the line officer discretion to develop flood warning systems," and the line officer in this case—the District Ranger—"did not consider flash flooding as a hazard." *Id.* at A10, A11. "Because the decision not to post the flood warning falls within the discretionary function exception, the government is not subject to suit under the FTCA." *Id.* at A12.

ARGUMENT

The District Ranger's determination not to warn recreational users of Tanque Verde that flash flood hazards exist falls within the FTCA's discretionary function exception. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The FTCA excludes from its waiver of sovereign immunity any claim "based upon the exercise or performance

or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee, * * * whether or not the discretion involved be abused." 28 U.S.C. 2680(a). As this Court has explained, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). The court of appeals correctly concluded that the discretionary function exception applies in this case.¹

Petitioners assert (Pet. 8-11) that the court of appeals erred because the Forest Service Manual "specifically prescribes" a system for warning or protecting visitors from flash floods within the meaning of *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). That contention is without merit. The Forest Service Manual simply directs District Rangers to maintain public safety, vesting broad discretion in "line officers" to achieve that objective. See p. 2, *supra*. The Forest Service Manual bears no similarity to the regulations at issue in *Berkovitz*, which established a step-by-step process for licensing and releasing polio vaccines. The District Ranger's decision as to what dangers require warnings or other precautions plainly involves "an element of judgment or choice." *Berkovitz*, 486 U.S. at 536.

2. Petitioners also contend (Pet. 11-13) that the Regional Director's exercise of his discretion was not grounded in public policy considerations of an economic, social, or political nature. That contention is incorrect.

¹ Petitioners' discussion of negligence under Arizona law (Pet. 7) is therefore beside the point. The discretionary function exception bars the action as a matter of federal law, regardless of state negligence law or even of the defendant's actual negligence.

First, the entire Public Safety Action Plan (Pet. App. A24-A27) represents a careful selection of the most pressing problems facing the Ranger District and a decision of how best to accommodate a number of concerns: the safety of Tanque Verde Falls visitors, the limited resources of the Ranger District, and the needs of the wilderness area. See *id.* at A11. The District Ranger's conclusion that flash floods are not one of the area's main hazards and that the District's limited resources should be directed to protect the public from other dangers represents exactly the type of policy judgment that the discretionary function exception was designed to protect.

Petitioners argue (Pet. 11) that the government failed to demonstrate that it actually weighed economic, social, or political policies in formulating the Public Safety Action Plan. However, "it is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision. * * * '[T]he relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.' " *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 891 F. 2d 31, 37 (2d Cir. 1989), quoting *United States Fidelity & Guar. Co. v. United States*, 837 F. 2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988). See also, e.g., *Kennewick Irrigation Dist. v. United States*, 880 F. 2d 1018, 1028 (9th Cir. 1989). The decision whether to undertake the massive effort required to identify and warn or protect against the myriad natural hazards in wild, undeveloped recreation areas is susceptible to analysis based on social and economic policy. The decision not to identify and warn against a particular danger in these areas is therefore exempted from liability.²

² Petitioners contend (Pet. 11) that the court of appeals' decision in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), requires the

3. Petitioners further contend, incorrectly, that the decision in this case conflicts with decisions of other courts of appeals. See Pet. 13-16. Petitioners' primary case, *Mandel v. United States*, 793 F. 2d 964 (8th Cir. 1986), is entirely consistent with the decision below. In *Mandel*, the court of appeals determined that "[t]he conduct forming the basis of the Park Service's alleged negligence was not the decision to institute a policy of warning park users of the hazards * * * but rather was the failure of Park Service personnel to comply with the previously adopted safety policy." *Id.* at 967. Petitioners' remaining cases (Pet. 15-16 & n.4) involved the failure to post warning signs at the sites of known existing hazards, such as submerged rocks in swimming areas, or weak ground surrounding superheated thermal pools. The action in question here, by contrast, is the District Ranger's decision whether or not to consider an unpredictable natural event to be a danger—an action infused with the very type of policy discretion the exemption was designed to protect from judicial interference. Petitioner fails to recognize this crucial distinction, one on which there is no circuit conflict.

government to demonstrate that it exercised policy judgment. But the court held in *Dube* that an affirmative exercise of policy judgment is required only in cases where "the government is operating in a capacity * * * highly analogous to private industry * * *," not where the activity "is a traditional governmental function." *Id.* at 798, 799. Here the government was engaged in a traditional governmental function—namely, regulating the public lands. Thus, even if the distinction drawn in *Dube* were valid, it does not require an affirmative showing in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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